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Dianna Espinoza and Paige Hunsaker v. Gold Cross Service, Inc. : Reply Brief

Utah Court of Appeals

Roger H. Hoole; Hoole and King; Attorney for Appellant.
Alan L. Sullivan; Amber M. Mettler; Snell and Wilmer; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

DIANNA ESPINOZA and PAIGE HUNSAKER, Plaintiffs/Appellants, v. GOLD CROSS SERVICE, INC., d.b.a. GOLD CROSS AMBULANCE, Defendant/Appellee.	**REPLY BRIEF OF APPELLANTS** Appellate No. 20090011

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Alan L. Sullivan (3152)
Amber Mettler (11460)
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Roger H. Hoole (5089)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

II. STATUTES, RULES AND REGULATIONS

Appellants, Dianna Espinoza ("Espinoza") and Paige Hunsaker ("Hunsaker"), respectfully submit this Reply Brief of Appellants in response to the Brief of Appellee filed by Gold Cross Services, Inc., d.b.a. Gold Cross Ambulance ("Gold Cross").

ARGUMENT

1. IT IS UNDISPUTED THAT ESPINOZA AND HUNSAKER REQUESTED THEIR OWN MEDICAL RECORDS.

Gold Cross's arguments regarding the nature of Espinoza's and Hunsaker's requests for their medical records are based on a false premise. That premise is that they are not entitled to copies at a reasonable cost-based fee for one simple reason: their records were mailed to them at their attorney's office. Throughout its brief, Gold Cross builds this argument and attempts to shift this Court's focus from the proper inquiry of whether its patients ***requested*** their records to where its patients requested they ***receive*** their records.

Gold Cross advances its premise by ignoring the plain language of 45 C.F.R. §164.524(c)(4) which focuses solely on who requested the records:

> If an individual ***requests*** a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:
> (i) Copying, including the cost of supplies for and labor of copying, the protected health information ***requested*** by the individual; [and]
> (ii) Postage, when the individual has ***requested*** the copy, of the summary or explanation, be mailed. . . .

(Emphasis added.) On its face, it is clear that the regulation does not even consider where the patient wants to receive the records.

Gold Cross also advances its false premise by attempting to ignore critical facts. For example, it completely sidesteps the core factual issue of whether Espinoza and Hunsaker personally requested their records:

> Appellants contend that because they requested their medical records for their use and directed that these records be sent to them at their attorney's office, they were the 'intended recipients' of the request to Gold Cross and, therefore, Appellants' requested their medical records as individuals under the applicable DHHS regulations. (AOB at 6, 14.) ***This, however, is not a disputed fact; the nature of Appellants' request to Gold Cross under the DHHS regulations is a matter of law.***

Brief of Appellee at 5 (emphasis added). Not so. Gold Cross' efforts to avoid the factual issue of whether Espinoza and Hunsaker requested their records is misplaced. The amount it can charge for medical records under 45 C.F.R. §164.524(c)(4) depends entirely on who requested them. Thus, its claim that "there is no dispute as to any fact – material or otherwise" is only true to the extent it is conceding the dispositive fact that Espinoza and Hunsaker requested their records as individuals, as they have always maintained. Brief of Appellee at 6.

Similarly, the premise that this Court should focus not on who requested the records, but on where the records were received, is not supported by the cases on which Gold Cross relies. This is clear in *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007) where the court noted the dispositive fact that "Kirk Webb's lawyers–the law firm of Mann & Cook–requested Webb's records. . . ." *Id.* at 1080. Based on that critical fact, the court applied the proper analysis and held that "the HIPAA regulations require the reduced

rate only when the individual himself ***requests*** the records." *Id.* (emphasis added). Similarly, in *Bugarin v. Chart One, Inc.*, 38 Cal Rptr. 3d 505, 511 (Cal. Ct. App. 206), it was dispositive that "the request for Bugarin's medical records was made by the law firm of Mann & Cook, not by Bugarin personally."

In its quest to have this Court focus only on where its patients received their records, Gold Cross completely ignores what its Patient's Authorizations actually say. On their face, they are clearly requests for records by and from patients, not third-parties. (*Espinoza* R. at 154-5 and *Hunsaker* R. at 143-4.) The fact that in addition to requesting their records, Espinoza and Hunsaker directed that their records be sent to them where they could review and use them in conjunction with their attorney is beside the point. The authority relied on by Gold Cross makes this clear.

Regardless of Gold Cross' insistence that this case should turn on where its patients directed that their records be sent, in its brief, it admits that "[a]fter receiving these payments [the $30.00 flat fee paid in protest by Espinoza and Husaker], Gold Cross promptly provided copies of the Appellants' medical records. . . ." Brief of Appellee's at 5. Therefore, Espinoza and Hunsaker ***actually received*** their medical records exactly as they requested them. This fact is not disputed anywhere in the record.

In summary, the threshold issue is whether the trial court erroneously found that the "facts do not show that Plaintiffs were seeking their medical records as individuals." (*Espinoza* R. at 492.) That finding was erroneous. Gold Cross admits (as it must) that there

are no facts in dispute as to who requested the records; it only disputes who received them. Brief of Appellee at 5. This undisputed fact is dispositive of the threshold issue because Espinoza and Hunsaker personally requested their records. The disputed fact does not raise a genuine issue because they also eventually received their records as requested.

Therefore, on this threshold point, the trial court's ruling granting Gold Cross' motion must be reversed and Espinoza's and Hunsaker's cross motion should be granted.

2. GOLD CROSS WAS UNJUSTLY ENRICHED BY HOLDING ESPINOZA'S AND HUNSAKER'S MEDICAL RECORDS HOSTAGE.

It is undisputed that Gold Cross demanded and received $30.00 from both Espinoza and Hunsaker before it would release copies of their records. Each of their records consisted of three pages. (*Espinoza* R. at 112, 150-69 and *Hunsaker* R. at 107, 188-90.) Because bills were included with the records themselves, the envelopes showed postage costs of $0.37 and $0.60, respectively. (*Espinoza* R. at 112, 137-9, 151, 159-62 and *Hunsaker* R. at 107, 130-32, 155-6 188-90.) Espinoza and Hunsaker paid the demanded flat fee under protest.

Gold Cross raises two challenges to Espinoza's and Hunsaker's unjust enrichment claim. First, it correctly notes that Health Insurance Portability and Accountability Act of 1996 ("HIPAA") does not provide a private statutory cause of action. Second, it argues that Espinoza's and Hunsaker's claims for unjust enrichment cannot be maintained because there was no agreement between the parties. These arguments will be addressed in turn.

Gold Cross is correct in its assertion that HIPAA does not provide a private cause of action. This case, however, was not brought under HIPAA. This case is based on the well recognized equitable doctrine of unjust enrichment. Importantly, the unjust enrichment claim is not preempted by HIPAA because HIPAA preempts only certain "contrary provisions of State law." 42 U.S.C. §1320d-7; 45 C.F.R. §§ 160.202, 203. Espinoza's and Hunsaker's unjust enrichment claims are not contrary to HIPAA.

Gold Cross also acknowledges that the "only two cases to substantively address . . . [HIPAA's copying] fee limitation provision . . . [in the context of state law claims] were Webb . . . [and] Bugarin." Brief of Appellee at 12, n. 13. Both of these cases, however, were decided based on the dispositive fact that a law firm, not a patient, requested its clients' records. Only the *Webb* opinion addressed the fact that there is no private cause of action under HIPAA. The *Webb* court found that the state law claims brought in that case were not preempted. *Webb*, at 1083. The *Bugarin* court simply recognized that the alleged HIPAA violation was a "factual predicate" to the state law claims. *Bugarin*, at 507.

A single case is cited by Gold Cross for the unrelated proposition that "because [a] claim for unjust enrichment is 'merely a recharacterization of the claim for benefits' it is 'barred by the preemptive effect of ERISA's legislative scheme.'" Brief of Appellee at 14. That case, *Peach v. Ultramar Diamond Shamrock*, 229 F. Supp. 759, 771 (E.D. Mich. 2002), is obviously an ERISA benefits case and is completely distinguishable.

In *Peach*, an employee became involved in his employer's acquisition by another company. During the acquisition, oral promises regarding severance benefits were made by his original employer which were allegedly not kept by the new employer. The employee filed suit contending that he was wrongfully denied benefits under an employee welfare plan as defined by ERISA. The court observed that "[a]n unjust enrichment claim seeking the disbursement of benefits is preempted because it is, in essence, one for benefits that 'relates to' the Plan and it does not fall under the rubric of 'other appropriate equitable relief' which ERISA allows. 29 U.S.C. § 1132(a)(3)(B)." *Peach*, at 770.

Gold Cross's reliance on *Webb*, *Bugarin*, and *Peach* in support of its HIPAA preemption argument is misplaced.

The final argument raised by Gold Cross to defeat Espinoza's and Hunsaker's unjust enrichment claim is that there was no "agreement between the parties" to obtain medical records for anything less than $30.00. Brief of Appellee at 15. In support of this argument, Gold Cross relies on *Knight v. Post*, 748 P.2d 1097 (Utah Ct. App. 1988), claiming: "Without such an agreement – express or implied, understanding, or even a promise between the parties, Appellants cannot bring a claim for quasi-contract or unjust enrichment." Brief of Appellee at 15. Again, Gold Cross's reliance on case law is misplaced.

It is true that no express, written contract existed between Espinoza or Hunsaker and Gold Cross relating to the requests for copies of the medical records. (*Espinoza* R. at 118 and *Hunsaker* R. at 114.) However, *Knight v. Post* does not require any kind of a contract

or agreement between the parties when a claim arises under the equitable doctrine of unjust enrichment. The Utah Court of Appeals addressed unjust enrichment as follows:

> In *Davies v Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987), this Court has identified two branches of *quantum meruit*: (1) contracts implied in law, also known as quasi-contracts ***or unjust enrichment, which are not actions to enforce a contract but are actually actions to require restitution***; and (2) contracts implied in fact which are contracts established by conduct.

Knight, at 1100 (emphasis added). Gold Cross overlooked this emphasized language when it assumed that a quasi-contract must exist to give rise to Espinoza's and Hunsaker's unjust enrichment claim.

While no such contract existed, nor was needed to bring this action, it is apparent that there was nonetheless an "understanding" between the parties.[1] That understanding is based on the following undisputed facts which gave rise to this suit: First, Espinoza and Hunsaker submitted their Patient's Authorizations in which they promised to pay a reasonable cost-based fee for copies of their records. Second, Gold Cross refused their offers and held their records hostage. Third, both patients were then forced to confer a benefit on Gold Cross by paying the demanded $30.00 flat fee. Espinoza sent a personal money order under protest and Hunsaker sent a personal check under protest. Fourth, Gold Cross knowingly demanded and accepted these benefits before it released its respective patients' three page records.

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[1] In any event, Gold Cross would seem to be content if there was an "understanding": "Without such an agreement – express or implied, ***understanding***, or even a promise between the parties, Appellants cannot bring a claim for quasi-contract or unjust enrichment." Brief of Appellee at 15 (emphasis added).

Fifth, Gold Cross thereafter retained these benefits even though they were conferred on it by its patients under circumstances making its retention of them inequitable.

The elements of unjust enrichment are thus satisfied. *See American Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1192 (Utah 1996). Furthermore, the elements of unjust enrichment are satisfied based on undisputed facts, including the fact that Gold Cross understood that its patients had paid under protest and reserved the right to sue it for holding their records hostage.[2]

Gold Cross does not dispute any of these facts. Indeed, it maintains that "there is no dispute as to any fact – material or otherwise." Brief of Appellee at 6. And nowhere in the record does it dispute the fact that the $0.25 per page amount offered by Espinoza and Hunsaker for their records was, at least, a reasonable cost-based fee as contemplated by HIPPA. Therefore, Gold Cross was unjustly enriched at the expense of its patients in the amount of $30.00, less the reasonable cost-based fee of copying their records. That amount is $0.75, or less, plus postage.

Based on this record, Espinoza's and Hunsaker's cross motion for summary judgment should be granted.

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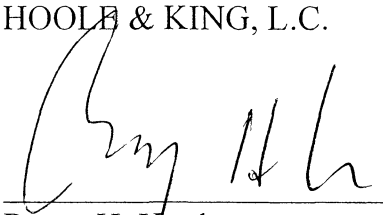
[2] Interestingly, Gold Cross refunded the $30.00 payment to Espinoza, but then sent a $30.00 invoice to her attorney. (*Espinoza* R. at 95, 119.) In response, Gold Cross was notified that Espinoza's attorney would pay that amount under protest and later seek reimbursement from her. (*Espinoza* R. at 120, 166.) As required, Espinoza subsequently reimbursed her attorney $30.00. (*Espinoza* R. at 120, 168.) Gold Cross never attempted to reimburse Hunsaker in this manner.

CONCLUSION

Based on these undisputed facts, the trial court should have granted Espinoza's and Hunsaker's motions and denied Gold Cross' motion. Accordingly, the judgment of the trial court should be reversed in part[3] and judgment should be entered in favor of Espinoza and Hunsaker with an order that Gold Cross return the amount it was unjustly enriched to them.

RESPECTFULLY SUBMITTED this 9th day of November, 2009.

HOOLE & KING, L.C.



Roger H. Hoole
Attorneys for Appellants,
Dianna Espinoza and Paige Hunsaker

[3] Appellants have not argued on appeal that the trial court erred when granting Gold Cross' motion for summary judgment on their Utah Consumer Sales Practices Act claim. Accordingly, that issue need not be resolved until another day.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2009, I caused two true and correct copies of the foregoing to be placed in the United States Mail, postage pre-paid and addressed to the following:

Alan L. Sullivan
Scott C. Rosevear
Amber Mettler
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

✓ U.S. Mail
____ Hand Delivery
____ Overnight
____ Facsimile